

May 19, 2021

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
Civil Docket No. 3:16-md-2738-FLW-LHG

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IN RE:

JOHNSON & JOHNSON TALCUM                      STATUS CONFERENCE VIA  
POWDER PRODUCTS MARKETING,                      REMOTE ZOOM  
SALES PRACTICES AND PRODUCTS                      VIDEOCONFERENCE  
LIABILITY LITIGATION

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\*           \*           \*           \*

WEDNESDAY, MAY 19, 2021

\*           \*           \*           \*

BEFORE:   SPECIAL MASTER JOEL SCHNEIDER, USMJ, RETIRED  
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Transcript of proceedings in the

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above matter taken stenographically by

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Theresa Mastroianni Kugler, Certified Court Reporter,

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license number 30X100085700, Notary Public of the

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State of New Jersey and the Commonwealth of

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Pennsylvania, VIA ZOOM REMOTE VIDEOCONFERENCE,

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commencing at 3:59 PM.

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1 SPECIAL MASTER SCHNEIDER: Let's go on  
2 the record.

3 We're on the record in the Talc MDL.  
4 This is Special Master Schneider.

5 I received a letter via email earlier  
6 today from the plaintiffs regarding a dispute  
7 regarding a deposition apparently to be held tomorrow  
8 of Dr. McCarthy and certain documents. We were  
9 fortunate enough to get this Zoom call scheduled on  
10 short notice.

11 I've read the written submission from  
12 the plaintiffs. Mr. Bernardo was kind enough, in  
13 response to my request, to send me the one document  
14 at issue. And I'm very appreciative that he  
15 identified for me the redacted portions that the  
16 plaintiffs have not yet seen.

17 I received, as I said, the unredacted  
18 portion and I read everything that was redacted. Of  
19 course, I'm not ruling right now because I haven't  
20 heard from the plaintiffs yet. So it's plaintiffs'  
21 application. Why don't we hear from the plaintiffs,  
22 we'll hear from the defendants, and we'll make a  
23 ruling.

24 MR. TISI: Good morning, your Honor.  
25 This is Chris Tisi with Levin, Papantonio, Rafferty

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1 on behalf of the plaintiffs.

2 There are two issues here, one more  
3 immediate than the other. The first issue is, as you  
4 correctly stated, whether or not we get a fuller  
5 version of the performance evaluation that you have  
6 in front of you.

7 And the second is less immediate but  
8 probably more troublesome, and that is the lack of  
9 the evaluations that we had presumed and understood  
10 and know exist, but have not yet been located or  
11 produced not only for any of the witnesses who have  
12 been deposed previously, but for upcoming witnesses.

13 So I'd like to at least turn to the  
14 first issue because it is the most immediate one, but  
15 I'd also like to address the second issue, if that  
16 would be okay with you.

17 SPECIAL MASTER SCHNEIDER: Mr. Tisi, I  
18 apologize for interrupting, but as long as we're at  
19 this beginning stage, I did scratch out what I  
20 thought the issues were that were raised in this  
21 letter. They're a little bit broader than you had  
22 just stated. I'll read what my notes indicate and  
23 I'm happy to address any issue regarding the letter.

24 MR. TISI: Okay.

25 SPECIAL MASTER SCHNEIDER: First,

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1 regarding Dr. McCarthy. Of course, Mr. Tisi stated  
2 there is a concern that only one PPE was produced.  
3 And then there is the issue about whether the  
4 redactions are appropriate.

5 The second issue is, there was an issue  
6 raised as to the redactions for witnesses Mann,  
7 Metaschime and Wille, W-I-L-L-E.

8 And three, the plaintiffs raised an  
9 issue about, I suppose, these documents in the  
10 context of future deponents and how they're going to  
11 be handled.

12 I think it makes sense, Mr. Tisi, to  
13 start with the two issues you raised. One, the  
14 completeness of the production and, two, the  
15 appropriateness of the redactions for Dr. McCarthy  
16 and then we can go to all the other issues.

17 MR. TISI: Sure. And I appreciate  
18 that, your Honor. I think all those issues are  
19 accurate. They just salami-slice them a little  
20 tighter, so let me address them the way in which you  
21 have identified them.

22 Just by way of background, Mr. Bernardo  
23 and I have been spending a lot of quality time  
24 together working through a lot of issues relating to  
25 not only the depositions being taken in this MDL, but

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1 also depositions that are coordinated with the MDL.  
2 And I don't want to even start without acknowledging  
3 that we have been able to work amicably together to  
4 try to get most of that stuff done.

5 One of the issues that I'm trying to  
6 coordinate, and Dr. Mann is actually a Missouri --  
7 comes out of a Missouri subpoena, a Missouri  
8 deposition which was cross-noticed in the MDL. So  
9 procedurally we've taken this particular issue to you  
10 because of your availability and on behalf of the  
11 MDL.

12 As part of our discussions going back  
13 months now in setting these depositions up, one of  
14 the things that Mr. Bernardo and I talked about was  
15 the production of personnel files, which, of course,  
16 your Honor has ruled on in other litigations,  
17 including the Valsartan case.

18 We worked out an agreement that allowed  
19 the plaintiffs to basically get two kinds of  
20 information. First is financial information relating  
21 to kinds of compensation that the witnesses get.  
22 That's not at issue here. But what was at issue and  
23 what is at issue is the performance evaluations and  
24 performance reviews.

25 I must say that my immediate



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1 understanding and my appreciation was that such  
2 evaluations existed, if not half-yearly, on a full  
3 yearly basis because we had actually seen some of  
4 them in the production of documents that have -- the  
5 normal production, but not in connection with any  
6 particular witness. So we had a sense that these  
7 evaluations were done on every J&J employee.

8 And so we reached an agreement that we  
9 would be provided with these performance evaluations.  
10 And then the discussion was, well, what information  
11 could be redacted. And from my perspective, we  
12 agreed, and this was before you were appointed  
13 Special Master, I had a copy of your order that I was  
14 aware of so I used it as a guideline for myself, we  
15 tried to tailor it that would be in a way that would  
16 be -- that would allow us to get to the issues. I  
17 think the phrase said get to the issues quickly in  
18 this case.

19 And what we wanted to understand from  
20 their evaluation is what the key witnesses that we  
21 are deposing in this case, what were they doing in  
22 relationship primarily to the talcum powder question  
23 and the question of whether it would cause cancer.

24 And so Mr. Bernardo and I agreed  
25 basically that we would be provided with any

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1 information that was directly related to talc, to its  
2 ability to cause cancer, but also directly and  
3 indirectly.

4 And, you know, the indirectly  
5 qualification I think seems to be the point here. I  
6 look at that as a fairly broad statement. I don't  
7 look at it as a -- you know, if, for example,  
8 Mr. McCarthy was working on a clinical trial related  
9 to Tylenol, I'm not sure I would care about it and I  
10 probably -- I would probably view that as a  
11 carve-out. On the other hand, if he was working  
12 primarily on issues relating to talc and his  
13 supervisor did an evaluation and said he's done a  
14 great job this year and we know this year he was  
15 working on talc, I feel like that would be within the  
16 scope of our agreement.

17 So we reached that agreement probably,  
18 and Rich will probably correct me because he's good  
19 with dates, probably two, three months ago. And the  
20 first deposition we got, I understood that there  
21 would be a lag time in getting these personnel files  
22 because, as I understood it, they were offshore in  
23 some fashion.

24 The first witness who was deposed was a  
25 witness by the name of Lorraine Tolovsky (ph). We

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1 didn't get, I don't recall exactly, but we didn't get  
2 very much of a production of any of these  
3 evaluations, although she's been almost a 30-year  
4 employee with the company and worked on talc the vast  
5 majority of those 30 years.

6 We didn't get one for witness Wille.  
7 We didn't get any for witness Mann. We didn't get  
8 any for witness Metaschime. We may have gotten one  
9 or two here or there. So now we're at the point  
10 where we're looking at Dr. McCarthy.

11 Dr. McCarthy, I understood from a call  
12 that Rich and I had on Thursday, that he was going to  
13 be producing an evaluation they had located. That's  
14 the one that you have before you. It was provided to  
15 us on Friday. We tried to communicate on Saturday  
16 and then again on Monday. And so that's where we are  
17 procedurally.

18 So the first question is whether or not  
19 we get a more fulsome version of the evaluation we  
20 have from 2008. Obviously, I'm working at a little  
21 bit of a deficit because you have seen what is  
22 underneath the redactions and Mr. Bernardo has seen  
23 what's underneath the redactions, but based upon the  
24 categories of information that I am aware of, it  
25 would appear that the information, at the very least,

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1 falls under the indirect relationship to talc  
2 agreement that we have had amongst ourselves and that  
3 they should be produced. Obviously, you reviewed it,  
4 you might have a better view of what it shows.

5 What I am concerned about, though, is  
6 moving to kind of the second point, which is where  
7 are all of these evaluations? We provided you with  
8 an exemplar deposition of Mr. -- actually of Dr.  
9 McCarthy's predecessor, a gentleman by the name of  
10 Dr. Mann. Dr. Mann testified that he had these  
11 evaluations on a yearly basis, that he expected that  
12 they would be within his personnel file, and I  
13 believe that that was the standard, candidly, for  
14 every executive and employee at Johnson & Johnson.

15 We have now had four witnesses,  
16 including the witness tomorrow, and we have no -- we  
17 have virtually no -- none of these reports. So, you  
18 know, kind of rounding out, kind of stating what the  
19 problem is, we have a witness tomorrow where we have  
20 an agreement to produce evaluations. We have one, I  
21 believe, that we had previously based -- that we had  
22 located in the general production, one that was  
23 produced by Mr. Bernardo on Friday in a heavily  
24 redacted form, and so we don't have what I thought we  
25 were going to be getting for this witness or any of

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1 the other prior witnesses.

2 I don't know what to do about it except  
3 to say it's really surprising to me that a company  
4 with this level of sophistication has not been able  
5 to locate, for any of the witnesses we have deposed  
6 so far, evaluations that we know occur on a yearly,  
7 at least, basis.

8 So that's kind of -- I know, Leigh,  
9 you've looked at this question. If there is anything  
10 you would like to add to it, you know, feel free to  
11 add. But that's where we are, your Honor. I'm kind  
12 of asking for your help.

13 SPECIAL MASTER SCHNEIDER: Mr. Tisi,  
14 thank you for your explanation.

15 Before we get to Mr. Bernardo, maybe we  
16 can deal with one issue at a time.

17 MR. TISI: Sure.

18 SPECIAL MASTER SCHNEIDER: Why don't we  
19 deal with the redaction issue first.

20 MR. TISI: Sure.

21 SPECIAL MASTER SCHNEIDER: Then we'll  
22 get to the completeness of the production.

23 MR. TISI: Sure.

24 SPECIAL MASTER SCHNEIDER: I've read  
25 the document that's been presented to me and you've

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1 made a representation that the agreement between you  
2 and J&J was obviously anything directly related to  
3 talc has to be produced, and anything indirectly  
4 related to talc had to be produced. Frankly, that's  
5 what I assumed the agreement was.

6                   There are references in this document,  
7 for example, to different products that, at least to  
8 my unsophisticated mind, have nothing to do with  
9 talc: Insect repellent, sun screen, cold sore  
10 patches. Can I assume that we can put that in the  
11 category of irrelevant information that you're not  
12 interested in?

13                   MR. TISI: If it's specific to that,  
14 your Honor, yes. If it is general and it says all  
15 the projects that Dr. McCarthy worked on he did  
16 satisfactory or unsatisfactory, I would think that  
17 that would be in the general category of information  
18 that we would want because talc would be within the  
19 scope of that.

20                   SPECIAL MASTER SCHNEIDER: Okay.

21                   There is a reference, for example, to  
22 library services. Is that something you're  
23 interested in?

24                   MR. TISI: No, your Honor.

25                   SPECIAL MASTER SCHNEIDER: I didn't

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1 think so.

2 So I did go through this document with  
3 precisely the understanding that you explained.

4 I do have a couple of questions for Mr.  
5 Bernardo. We'll hear his argument first. And I'm  
6 going to question him about a couple of the  
7 redactions that I see, whether they're appropriate or  
8 not. And then we'll see where we are.

9 But generally, on the whole, it appears  
10 to me that most of this document, it's pretty  
11 complete, not all of it was redacted, at least  
12 superficially was appropriate.

13 Let me hear from Mr. Bernardo. Let's  
14 hear your argument and then I'll present to you my  
15 questions about the redactions that may be  
16 questionable.

17 MR. BERNARDO: Thank you, your Honor.

18 And at the risk of starting a virtual  
19 group hug, I also want to acknowledge what Mr. Tisi  
20 was saying at the beginning and just say I do  
21 appreciate that I think this litigation and our  
22 relationship is an example of what works right in  
23 litigation and we've been working together quite  
24 cooperatively and I appreciate and want to  
25 acknowledge that. Obviously, at times we disagree,

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1 and when we do, here we are, and we can sort that  
2 out. So I at least want to acknowledge what Mr. Tisi  
3 was saying.

4 I also want to point out by way of  
5 background, your Honor, that the J&J defendants  
6 generally disagreed with the relevance of personnel  
7 files. We were mindful of your honor's opinion,  
8 we're mindful of other opinions, and there is a  
9 differing set of viewpoints in the case law with  
10 respect to the producability of those. And it was  
11 our impression that the purpose, at least from your  
12 Honor's ruling, was to really focus on making sure  
13 that the discovery is helping the parties to be  
14 efficient in the deposition, that the personnel files  
15 for evaluations at times could be used to make a  
16 deposition efficient and focus in on the relevant  
17 rather than tangential issues. So we did agree to  
18 provide information in evaluations along the lines  
19 prescribed.

20 We're also mindful of two really  
21 important things. One is, without suggesting that  
22 anybody on this Zoom call would use these  
23 inappropriately, this litigation, as we've explained  
24 in prior calls with your Honor, is part of a much,  
25 much larger picture. And just suffice it to say that



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1 not everybody always plays by the same rules, and  
2 we've found that things that are designated as  
3 confidential end up somehow in newspapers and we're  
4 really just trying to be very mindful of that in a  
5 case like this, that, you know, I wish it were all in  
6 the federal court system, but it's not and a lot of  
7 things happen.

8                   So we're trying to, you know, balance  
9 out making sure that the plaintiffs get what they  
10 need and also protecting the privacy interests of  
11 personnel and other products that have nothing to do  
12 with this litigation. That's the backdrop against  
13 which we came to the agreement that we did.

14                   We believe, and, you know, people can  
15 have differing views on this, that what we did was  
16 appropriate. And to kind of give you a little bit of  
17 context, and your Honor pointed out things I circled,  
18 on my copy of this, beauty masks, sun screens,  
19 Neutrogena insect repellent, antiaging creams. We  
20 just didn't think that commentary on those, either by  
21 way of a development plan or by way of his  
22 performance on that, has any relevance here and  
23 shouldn't be produced.

24                   And I do acknowledge and I want to  
25 point out that the way these work, and I think your

1 Honor knows that, and obviously Mr. Tisi hasn't been  
2 able to see them, but I know two examples were  
3 pointed out. One is at the top of page 2 where it  
4 talks about Tim supporting a baby franchise  
5 product -- I'm sorry, project. And we left lots of  
6 stuff unredacted to the extent that it could arguably  
7 relate to that. But then we began redacting those  
8 things where it's very obvious that the subject has  
9 changed and they're talking about something else.

10 And to be honest, your Honor, this  
11 wasn't just my looking at it saying I don't think  
12 this relates to anything. I ensured that my  
13 colleagues, who were working with Mr. McCarthy to  
14 prepare him for his deposition, went through with him  
15 to say does this have any bearing on or any relevance  
16 to any work you did with talc? And one of things  
17 that we learned that was very important was in this  
18 particular year for which this evaluation was  
19 created, Mr. McCarthy's work on talc took  
20 approximately five percent of his time. So it's not  
21 like he spent, you know, his days every day working  
22 on talc. It's certain that there were periods where  
23 he spent more time on it, but we felt in light of  
24 that, even some of the general comments that did not  
25 specify sun screen did not relate to talc, and we

1 confirmed that with him. So this was not just, you  
2 know, Rich Bernardo taking a look at it. We really  
3 made the effort to ensure that we were correct  
4 because we just wanted to make sure that if we were  
5 not, that we would unredact things.

6 And apropos of that, when Mr. Tisi  
7 pointed out some of these issues to me over the  
8 weekend, I tried to go back and say, look, let me see  
9 if I can go a little bit further, even though the  
10 things that I would unredact don't really relate to  
11 talc, just in the spirit of compromise. That's how  
12 we got to where we are.

13 I think what we did is very consistent  
14 with your Honor's ruling in Benicar and I think it's  
15 sort of important to look at this not just in the  
16 context of, you know, what words might suggest the  
17 context of what follows, but the actual facts.

18 And there is another one I didn't point  
19 out that I should point out because I know Mr. Tisi  
20 did in a letter to you which is also on page two.  
21 There is a comment that reached out to Rio Tinto  
22 supplier, and that's a talc supplier, your Honor, for  
23 technical support. But what's important is what  
24 follows, a semicolon. And what follows that  
25 semicolon has absolutely nothing to do with the prior

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1 sentence, and it has to do with get back to sun  
2 screen and work that they were doing in Europe. And  
3 I confirmed that as well with Mr. McCarthy.

4 So again, you know, you might look at  
5 this and have a different view, and I respect that,  
6 but we really did go through this in a good faith  
7 effort to provide them those things that were  
8 directly relevant and also to be mindful of general  
9 things that could be construed that relates to his  
10 work on talc. And what we sent to them was a product  
11 of that good faith effort.

12 SPECIAL MASTER SCHNEIDER: Do you have  
13 a time limit for the doctor's deposition tomorrow?

14 MR. BERNARDO: We Wish we did.

15 MR. TISI: We have -- again, because  
16 this deposition is being taken according to the rules  
17 in Missouri, we have a -- the deposition is occurring  
18 tomorrow with a spillover date on Thursday. Today is  
19 Wednesday. I forget what today is.

20 MS. PARFITT: On Friday.

21 MR. BERNARDO: Thursday and Friday.

22 MR. TISI: So, yeah, we have two days  
23 blocked off. The hope is to try to be as efficient  
24 and possible, but we do have two days blocked off.

25 SPECIAL MASTER SCHNEIDER: Mr.

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1 Bernardo, I just have a couple of questions about a  
2 couple other redactions.

3 MR. BERNARDO: Sure.

4 SPECIAL MASTER SCHNEIDER: On page  
5 four, the first number, it says intellectual  
6 curiosity.

7 MR. BERNARDO: Um-hum.

8 SPECIAL MASTER SCHNEIDER: It occurs to  
9 me that the redacted information is relevant to the  
10 witness' qualifications and I would suggest that that  
11 would be relevant to the issues. I can't tell you  
12 how relevant it is, but is there a strong  
13 disagreement with that?

14 MR. BERNARDO: This goes back -- in  
15 short, no, there is not a strong disagreement, your  
16 Honor. But this goes back to what we were saying in  
17 terms of the evaluation and what he was being  
18 evaluated for that year, and it really was  
19 very little talc, but no, there is not a strong  
20 aversion.

21 SPECIAL MASTER SCHNEIDER: Okay. So  
22 J&J shall unredact page four, column one,  
23 intellectual curiosity.

24 MR. BERNARDO: I'm sorry, your Honor.  
25 You mean row one?

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1 SPECIAL MASTER SCHNEIDER: Row one.

2 Excuse me.

3 Number two, the second paragraph in the  
4 third column.

5 MR. TISI: Are you still on page four,  
6 your Honor?

7 SPECIAL MASTER SCHNEIDER: Still on  
8 page four.

9 It talks about a certain kind of  
10 testing. Is that relevant to talcum powder?

11 MR. BERNARDO: It is not, your Honor.  
12 And that was not something that was being  
13 contemplated. As I understand it, and I'm happy to  
14 confirm that again with Mr. McCarthy, that relates a  
15 bit to the paragraph above which I understand relates  
16 to sun screen. I will certainly confirm that, but I  
17 actually looked at that very thing with the same  
18 question that your Honor had.

19 SPECIAL MASTER SCHNEIDER: In your  
20 professional judgment, that particular paragraph that  
21 I just pointed out, is that indirectly related to  
22 talcum powder?

23 MR. BERNARDO: In our judgment, your  
24 Honor, at this point in time it is not. But I'm  
25 happy to again re-raise that. And I would put this

1 in the category of things that we don't feel strongly  
2 about, but we're just trying to do something  
3 consistent in how we approach this because, as you  
4 can imagine, your Honor, it becomes a slippery slope.  
5 And if we had provided that notion, in other words,  
6 that we don't feel strongly about it, I could see us  
7 saying okay, well, then there is other stuff.

8 SPECIAL MASTER SCHNEIDER: Just as an  
9 aside, if I was in your shoes, I would want the  
10 plaintiffs to waste as much time as they can on  
11 irrelevant information, so I would give them as much  
12 irrelevant information as they want.

13 MR. BERNARDO: I thought what you were  
14 going to say, your Honor, was that's actually a very  
15 helpful thing to the witness for us, this particular  
16 paragraph, which shows you, your Honor, that we were  
17 not trying to do anything with respect to keeping  
18 information from them because this happens to be a  
19 helpful thing that I think you had evaluated, so.

20 SPECIAL MASTER SCHNEIDER: So if you  
21 double check that and you represent in your best  
22 professional judgment it's not indirectly related, I  
23 accept that.

24 But the last comment I have is Section  
25 6, his comments in year end, Section 6, employee

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1     comments, it seems to me that that's relevant to  
2     general issues. It doesn't specifically refer to  
3     talc, but I could see how plaintiff might deem that  
4     relevant.

5                     MR. BERNARDO: Fair enough, your Honor.

6                     SPECIAL MASTER SCHNEIDER: So I would  
7     rule that the second column, year end, in Section 6  
8     be unredacted.

9                     MR. BERNARDO: The second row you mean,  
10    I think.

11                    SPECIAL MASTER SCHNEIDER: Second row.  
12    I'm sorry.

13                    MR. BERNARDO: That's okay.

14                    SPECIAL MASTER SCHNEIDER: I'm  
15    confident that after reading this thoroughly that,  
16    one, it's obvious to me that the redactions were made  
17    in good faith. There is no question about it. And  
18    that wherever there was a legitimate question about  
19    whether something should be redacted or not, I raised  
20    it with Mr. Bernardo. Like I said, references to  
21    cold sore patch, sun screen, insect repellent,  
22    et cetera, the library, really have nothing to do  
23    with this case. And I think that the meat of what  
24    was questionable I raised with Mr. Bernardo and made  
25    the two rulings to unredact two portions. And Mr.



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1 Bernardo, I accept his representation on the one he's  
2 going to recheck.

3 I'm satisfied that J&J has otherwise  
4 satisfied its good faith obligations under the rules.

5 Now, the second issue, Mr. Bernardo --

6 MR. BERNARDO: Your Honor, I'm sorry,  
7 before we leave the first issue, may I just add one  
8 thing?

9 In the spirit of compromise in  
10 recognizing the deposition is tomorrow and not  
11 knowing if I'm going to be able to get ahold of the  
12 witness, I'm willing to unredact the second portion  
13 of the second -- sorry, the third row of number two,  
14 third column of number two -- now I'm doing it --  
15 that we talked about.

16 I just want to make it clear I'm  
17 agreeing to do that now believing that it's not  
18 relevant to talc. In other words, I just don't want  
19 it to be unredacted suggesting somehow that it was a  
20 concession by us that it's relevant. I'm really  
21 making that concession just as a compromise to move  
22 this forward and get this as quickly as possible.

23 SPECIAL MASTER SCHNEIDER: Are you  
24 talking about that whole box or just year end?

25 MR. BERNARDO: The year end part that

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1 you raised. I'm not going to go back to Mr. McCarthy  
2 is what I'm inartfully saying, I'm just going to  
3 agree to unredact it. But I just want it clear that  
4 that doesn't mean that we agree that it's relevant.  
5 And I don't think it is. I just want to do it to  
6 move past this efficiently.

7 SPECIAL MASTER SCHNEIDER: The second  
8 issue is the completeness of the production. And it  
9 seems to me that could be in two parts. If I was in  
10 Mr. Tisi's shoes, I expect I know what we're going to  
11 hear from you, but if I was in Mr. Tisi's shoes, to  
12 give my client some comfort, you may have this  
13 agreement amongst yourselves that you're going to  
14 produce these, what are they called, PPEs. If I was  
15 in his shoes, it would make me feel more comfortable  
16 if there was some type of order or directional ruling  
17 from the Court or Special Master that said these have  
18 to be produced, a reasonable search has to be done  
19 for them, et cetera. If, as I expect, you're going  
20 to say that the client made a reasonable search and  
21 can't find it, I don't know what I can do except to  
22 accept, and I always accept attorneys'  
23 representations until someone shows me something to  
24 the contrary.

25 So I'll hear you, Mr. Bernardo, but I

1 don't think Mr. Tisi is going to object if we put in  
2 some sort of ruling or order, whatever you call it,  
3 just to memorialize your agreement so he has some  
4 comfort that there is some oomph behind the  
5 agreement.

6 MR. BERNARDO: And I appreciate that,  
7 your Honor. And I also appreciate from where Mr.  
8 Tisi stands that, you know, I forget what words they  
9 used in their letter, but they just find it  
10 incredible that there aren't such documents. And  
11 I'll say to your Honor what I've said to Mr. Tisi,  
12 which is, as you would expect, we really did make a  
13 good faith effort. I personally spoke with the  
14 individuals coordinating with the people in  
15 personnel, and said, okay, you need to go back and  
16 you need to talk to them and tell them they need to  
17 look again and find materials.

18 I'll also say it's not -- I found a  
19 variety of -- I found inconsistency, is what I'm  
20 trying to say, when I've gone back and looked for  
21 personnel files and what's in there. And I've really  
22 found that it depends and varies very significantly  
23 with who a person's supervisor was, what they did,  
24 what they retained, and all of that. I found  
25 personnel files that have a number of these, and I've

1 found personnel files that have none. We actually  
2 didn't leave it at that. We went back to all the  
3 materials we've collected through the years and ran  
4 searches and that's how we found this, just to see if  
5 in somebody's custodial file that we looked for there  
6 was an evaluation and that was, for whatever reason,  
7 not included in the production.

8 As your Honor said, I can't, you know,  
9 create what doesn't exist any longer, but I can  
10 represent that we really did make good faith searches  
11 and will continue to do that to try and find these  
12 things. And otherwise, I really can't explain why  
13 they don't exist other than the vagaries of the  
14 supervisors and, you know, some people follow the  
15 rules in terms of reviews and other people less so.  
16 And sometimes things make it into people's personnel  
17 files and other times they don't.

18 MR. TISI: Your Honor, if I could --

19 SPECIAL MASTER SCHNEIDER: Could I add  
20 one thing, Mr. Tisi?

21 In my former life when I was on the  
22 bench, I always, always, always had the proviso that  
23 if documents were produced after a deposition that  
24 should have been produced before the deposition and  
25 they were materially relevant to the case, the

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1     questioner would have another opportunity to depose  
2     the witness on those new documents. And if the issue  
3     comes before me and it turns out that these documents  
4     are discovered and produced to you and they're  
5     materially relevant to the case and I have to rule on  
6     the issue, I would certainly rule that the witness  
7     has to be redeposed on those new documents.

8                     That should give you some comfort if it  
9     turns out, and I'm sure everybody is operating in  
10    good faith, but we live in the real world and who  
11    knows what's going to happen in the future, whether  
12    someone is going to open a file drawer and find  
13    something. But the comfort that you would have if  
14    the issue was ever presented to me and new documents  
15    are produced and, like I said, if they're materially  
16    relevant, you're not going to be prejudiced by that.  
17    I'll rule that you should be able to redepose the  
18    witness. I just wanted to make that clear on the  
19    record.

20                    MR. TISI: I really appreciate that.  
21    And I'd like to at least -- and I do want to talk  
22    really briefly and circle back on the evaluation that  
23    we talked about that was the first issue. But let me  
24    focus where we are right now.

25                    Your first question was whether or not

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1 we'd like to have a memorialization. I would like  
2 that. And let me just tell you why.

3 Initially when Rich and I kind of  
4 reached this kind of agreement months ago, you know,  
5 it was as we were scheduling things and trying to  
6 just get the train rolling.

7 What has seemed to become a pattern now  
8 is that we are getting these documents later than I  
9 expected to get them as we started going along. And  
10 what it doesn't do is it doesn't give me enough time  
11 to bring any issues to you that I need to bring to  
12 you.

13 And so I note that in the Benicar order  
14 that this information needed to be provided, I want  
15 to say, either ten days or two weeks prior to the  
16 deposition. I would ask that they be provided a  
17 period of time before the deposition and certainly  
18 more than a couple days. Because then it gives us an  
19 opportunity to look at them, identify any issues that  
20 we have, meet and confer and bring them to you if we  
21 need to do that. So having things memorialized with  
22 something in place would be useful for us.

23 SPECIAL MASTER SCHNEIDER: Tell me what  
24 your agreement is. I think that's perfectly  
25 reasonable.

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1 What is the agreement?

2 MR. TISI: Well, we didn't have an  
3 agreement on time and, Rich --

4 SPECIAL MASTER SCHNEIDER: Time will be  
5 fine. We'll make it a week prior to a deposition,  
6 but what's the agreement?

7 MR. TISI: I think it's more -- the  
8 agreement is more in the negative in that respect.  
9 If there is something in there that does not relate  
10 directly or indirectly to talc, they can remove it.

11 SPECIAL MASTER SCHNEIDER: No. First  
12 go back a step.

13 Are you talking about this particular  
14 form or any performance evaluation?

15 MR. TISI: Yeah, in the performance  
16 evaluations generally, we agreed, and I'll ask  
17 anybody else on my side if I'm misstating it because  
18 I know I've discussed these issues with both Ms.  
19 Parfitt and Ms. O'Dell, but we've agreed in the  
20 abstract, again assuming that these documents  
21 existed, that if there is information on these  
22 evaluation forms that do not relate directly or  
23 indirectly to talc, they can redact them. So if it's  
24 a -- you know, we did a clinical trial for sun  
25 screen, I don't need to see it. All right? But if

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1 it's, you know, all the work that Mr. McCarthy or Mr.  
2 Mann did this year was satisfactory and it included  
3 sun screen but also included talc, I get that.

4 I don't know if I'm being clear on  
5 that. But, you know, I think it's best said in the  
6 negative in that if it does -- if a specific piece of  
7 information does not relate directly or indirectly to  
8 talc, then they can redact it. And that was --

9 MR. BERNARDO: May I suggest, if it's  
10 helpful, your Honor, and I'm happy to work on it with  
11 Mr. Tisi, I have what we had put together and agreed  
12 to and the verbiage and we went back and forth on it  
13 and maybe that just gets embodied in an order because  
14 it says: The J&J defendants will provide portions of  
15 the witness' personnel file, any that include job  
16 descriptions and references to talc, talcum powder  
17 products or litigation regarding talcum powder  
18 products, parens, including performance evaluations  
19 specifically referenced or pertain to that employee's  
20 responsibilities with respect to talc, talcum powder  
21 products or litigation pertaining to talcum powder  
22 products.

23 And I think that's what Chris is  
24 saying. And I don't think we have a dispute as to  
25 that. I think, as we said, your Honor agrees with us



1 for the most part in terms of how we did it. There  
2 were a few provisions in here that you felt were more  
3 general, and we'll take that guidance going forward,  
4 but I don't think we have a disagreement as to what  
5 we would do. And I think that if we're going to  
6 embody it in an order, it probably makes sense not to  
7 start from scratch, but to use what --

8 SPECIAL MASTER SCHNEIDER: Okay. Can  
9 you email that to me, Mr. Bernardo?

10 MR. BERNARDO: I can.

11 (Cross-talk)

12 I'll do it after.

13 SPECIAL MASTER SCHNEIDER: Okay. Does  
14 this apply to future deponents in the case?

15 MR. BERNARDO: Yes.

16 MR. TISI: But Rich and I kind of had  
17 this agreement, and I think it's worked pretty well,  
18 that a lot of our communications, you'll notice that  
19 I didn't attach emails back and forth to your Honor,  
20 that we could speak candidly with each other without  
21 having words kind of thrown back at us. And what I'd  
22 like to do is, I don't want to be married to anything  
23 that Rich had in an email. I mean I think that --

24 MR. BERNARDO: Fair enough. Why don't  
25 I work --

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1 MR. TISI: I'd like to --

2 MR. BERNARDO: I was just suggesting we  
3 have a starting point.

4 MR. TISI: Yeah. I'd like to at least  
5 look at it and see whether we agreed to it and that's  
6 what we intended and we can talk about that as well.

7 MR. BERNARDO: Perfect.

8 SPECIAL MASTER SCHNEIDER: Fine with  
9 me. We're going to make it that it has to be  
10 reasonable efforts have to be used to produce the  
11 responsive documents one week before the deposition.

12 MR. BERNARDO: Okay. And I just want  
13 to comment that, your Honor, I completely agree and  
14 that's what we've been trying to do. And frankly, an  
15 order might be helpful to me in that regard. But as  
16 I think Mr. Tisi alluded to, the personnel  
17 department, as it were, for Johnson & Johnson is a  
18 consolidated -- I forget what they call them, shared  
19 services that is in the Philippines. And between the  
20 Covid restrictions and everything else, trying to get  
21 things from there has really -- I mean, we literally  
22 start the process the nanosecond after we decide who  
23 is going to be deposed. So we really are trying to  
24 make best efforts. And I literally, just this  
25 afternoon, got an update to Mr. McCarthy's personnel

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1 file which had nothing additional in it (audio  
2 distortion) short cut --

3 SPECIAL MASTER SCHNEIDER: That's why I  
4 used the word reasonable.

5 MR. BERNARDO: Thank you. I just  
6 wanted to point out that we're living in some  
7 circumstances that are a little bit different than we  
8 are accustomed to and it's making things a little bit  
9 more complicated to get, but I will make best efforts  
10 to do that.

11 SPECIAL MASTER SCHNEIDER: Mr. Tisi, if  
12 counsel represents that the company has conducted  
13 reasonable best efforts, good faith, reasonable good  
14 faith efforts, to locate and produce the responsive  
15 documents and they can't find them, what is left to  
16 do?

17 MR. TISI: I really want to address  
18 that question because this is really -- this is very  
19 troubling to me. And let me at least set the table  
20 for you, your Honor.

21 The ovarian cancer cases started being  
22 litigated, the first case was filed in 1999.  
23 Litigation holds were provided in 1999 for the  
24 ovarian cancer cases. For the mesothelioma cases,  
25 which overlap, as you know, in some material

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1 respects, go back even further than that. So that's  
2 one component here.

3 So there is a recognition that these  
4 documents -- this isn't litigation that was filed  
5 yesterday and we're saying, you know, you need to go  
6 back and find stuff that you had no idea you were  
7 ever going to have to produce in litigation and now  
8 you have to find them. That's the first issue.

9 SPECIAL MASTER SCHNEIDER: But what  
10 you're heading to invariably, Mr. Tisi, is the S  
11 word, spoliation. If you want to go down that road,  
12 I'm not stopping you. If you think there is a  
13 spoliation argument to make, I suppose you have to  
14 make a record and an application. But again, we're  
15 left with the situation where I know, I'm positive  
16 you accept Mr. Bernardo's representation, if the  
17 company made reasonable good faith efforts and they  
18 can't find them, what is there to do except put the  
19 ball back in your court if you want to pursue it and  
20 make a spoliation argument.

21 MR. TISI: Well, I mean let me tell you  
22 what I'd like to do.

23 SPECIAL MASTER SCHNEIDER: Okay.

24 MR. TISI: I'd want to -- you know,  
25 this is Chris speaking, I'm just kind of speaking and

1 I made the -- my immediate reaction, and this is  
2 something I mentioned to Rich, is we have now had  
3 four witnesses where we have had 95 percent of the  
4 performance evaluations for those witnesses not show  
5 up anywhere. You know, so it's not like I'm looking  
6 for the lint out of his pocket. Right? I mean this  
7 is -- we have a pattern here. Right?

8 So I would like to schedule a  
9 deposition, a short deposition to find out where  
10 these documents would typically be kept, whether  
11 they're done every year as the witnesses testified  
12 that they did, and so that it might actually flush  
13 out where these documents are.

14 SPECIAL MASTER SCHNEIDER: Why don't  
15 you ask Dr. McCarthy?

16 MR. TISI: Well, because -- because I  
17 mean, in part he doesn't know where the --

18 SPECIAL MASTER SCHNEIDER: How do you  
19 know?

20 MR. TISI: Well, I mean the reason why  
21 I know is because we asked Dr. Mann. Okay? We asked  
22 Dr. Mann, and Dr. Mann testified that yes, these  
23 performance evaluations are due every year; yes, I  
24 review them with my supervisor; yes, I sign them, but  
25 where they go after that, I don't know. You know, I

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1 know that they are used to calculate my wages, my  
2 salary and my compensation, but what they do with  
3 them, particularly after I'm gone from the company,  
4 you know, I don't care.

5 So really what I need is what happens  
6 to these things. We know that they're done. They  
7 testified that they're done. And I must tell you,  
8 your Honor, you're going to become more familiar with  
9 the record as time goes on, each of these witnesses  
10 were involved with major organizations, international  
11 organizations dealing with issues related to talc and  
12 ovarian cancer. I mean, the idea that somehow they  
13 weren't evaluated on those topics and they, across  
14 the board, never found their way into their personnel  
15 files to me is a little surprising.

16 So I would like to take -- I don't want  
17 to take up my time with Mr. McCarthy -- Dr. McCarthy  
18 trying to figure this out, which appears to be a  
19 global problem. I'd like to get somebody in the  
20 witness chair and say look, we now have four  
21 witnesses we've asked for these files, they've all  
22 testified that they're done, we have some, where is  
23 the 95 percent that we don't have?

24 SPECIAL MASTER SCHNEIDER: Can I make a  
25 suggestion, Mr. Tisi?

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1 MR. TISI: Yes.

2 SPECIAL MASTER SCHNEIDER: My  
3 suggestion is you should talk with your team to see  
4 if this is an issue plaintiffs want to pursue. There  
5 are lots of issues in this case and one of my  
6 favorite expressions is, is the juice worth the  
7 squeeze.

8 MR. TISI: I hear you.

9 SPECIAL MASTER SCHNEIDER: And if the  
10 plaintiffs think that it's worthwhile finding out  
11 what happened to these PPEs and you can't work it out  
12 with Mr. Bernardo about what to do, write me a  
13 two-page, three-page letter, we'll get a response and  
14 we'll decide whether that deposition will go forward.

15 MR. TISI: I told you I was just  
16 speaking off the top of my head, but I will do as you  
17 say and confer with my colleagues.

18 MR. BERNARDO: And, Judge Schneider, I  
19 don't disagree with the way you just suggested we  
20 proceed, but I want to make two points for the record  
21 to, I'll say, level-set.

22 First of all, there wouldn't be a  
23 witness or even many witnesses, as you can imagine,  
24 and I've worked with Johnson & Johnson companies for  
25 the better part of a decade and I've watched

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1 personnel go from within a company, they  
2 decentralize, go off shores. I mean it changes so  
3 frequently that I wouldn't even begin to know how to  
4 approach that.

5 SPECIAL MASTER SCHNEIDER: Well, that's  
6 why they make Rule 30(b)(6) depositions.

7 MR. BERNARDO: Understood. But even  
8 there, trying to track all of that down.

9 And the other thing, if you want to  
10 level-set, we're not talking about testing documents,  
11 we're not talking about research, we're not talking  
12 about things -- we're talking about what we would  
13 consider to be the most peripheral documents.

14 And again, without getting too far into  
15 it because we've seen these allegations made and  
16 argued them many times, but I disagree with the  
17 preservation obligations of a company, particularly  
18 with respect to personnel files.

19 But I just wanted to make those points  
20 for the record. I recognize this is a subject for  
21 another day, but I didn't want the record to go  
22 without that.

23 SPECIAL MASTER SCHNEIDER: Okay. So  
24 where we are then is the Court has ruled on the first  
25 issue, that there is three items that are going to be



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1     unredacted.

2                     With regard to the production itself,  
3     both of you are going to work on acceptable language  
4     to be incorporated in a court order or direction.  
5     You're going to meet and confer on this, what I call  
6     the spoliation issue. And if there is a dispute, you  
7     can raise it in the appropriate manner.

8                     MR. TISI: Thank you.

9                     SPECIAL MASTER SCHNEIDER: I  
10    represented on the record what I do in every single  
11    case about documents produced subsequent to a  
12    deposition that should have been produced before the  
13    deposition.

14                    So I think the first basic issue to  
15    deal with, we've dealt with. And moving on to the  
16    second issue, at least on my list from the letter  
17    that I read, what to do about Mann, Metaschime  
18    and Wille, is it?

19                    MR. TISI: Yeah.

20                    SPECIAL MASTER SCHNEIDER: Mr. Tisi,  
21    what's that dispute?

22                    MR. TISI: You know, it's the same  
23    dispute, just magnified out to other witnesses. I  
24    mean, we had other witnesses for whom we expected to  
25    get these -- the kinds of records that we've been

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1 talking about and we may have gotten one from one  
2 witness or one with another witness, but we certainly  
3 have not gotten 90-plus percent of the documents we  
4 expected when we reached the agreement.

5 So my only answer to that is if the  
6 answer is the same with respect to Wille, Metaschime  
7 and Mann as it was for McCarthy, which is we've  
8 looked everywhere and we can't find it, as incredible  
9 as that may seem to me and I think to anybody looking  
10 at this, I don't know what to do other than to say if  
11 you find them, produce them. I mean, you know, I  
12 can't --

13 SPECIAL MASTER SCHNEIDER: The order  
14 that you're working on, the language should not only  
15 apply to future deponents, but it should apply to  
16 people who have been deposed since X date, right?

17 MR. TISI: Yes.

18 SPECIAL MASTER SCHNEIDER: Okay.  
19 You'll put that in the order.

20 MR. TISI: Thank you.

21 SPECIAL MASTER SCHNEIDER: And  
22 hopefully if something turns up in the future,  
23 they'll be under an obligation to produce it.

24 MR. TISI: Thank you.

25 SPECIAL MASTER SCHNEIDER: And then the

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1 third issue is what to do about future deponents.  
2 And it just seems to me, we may have dealt with that  
3 issue, we're going to get appropriate language that  
4 you two are working on. And Mr. Bernardo is going to  
5 continue to make sure his client uses reasonable good  
6 faith efforts. And if they don't find anything,  
7 he'll make a representation on behalf of the company.  
8 If you want to cover it at the deposition, you can.  
9 If you want to go down the spoliation issue, like we  
10 said, you'll meet and confer with Mr. Bernardo and if  
11 there is a dispute, we'll get on a Zoom.

12 MR. TISI: Yeah, we'll do that. And,  
13 your Honor, at the risk of trying everybody's  
14 patience here, let me ask you this question. There  
15 was something about the original document that kind  
16 of brought all this to a head that I just had a  
17 question on.

18 SPECIAL MASTER SCHNEIDER: Sure.

19 MR. TISI: If you go back to the EPE,  
20 page two, if we could.

21 SPECIAL MASTER SCHNEIDER: Got it.

22 MR. TISI: Okay.

23 As I see it, as I'm reading the goal  
24 objective number five, it's separated out into two  
25 half-year periods. The first half-year involves

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1 technical leadership on the ingredients issues  
2 working group, providing tactical defense for  
3 existing ingredients, and strategic planning for  
4 future regulatory toxicology issues. And the second  
5 one deals with dealing with toxicology issues  
6 relating to product.

7 I happen to know just historically  
8 during this particular year there was a lot of work  
9 within these committees that are identified here  
10 relating to talc. I just know that. That's just  
11 part of the record. And I don't know whether or not  
12 the mid-year assessment that falls underneath that  
13 topic, you know, that may not be apparent to your  
14 Honor, but I just want to make sure that that  
15 assessment doesn't have anything to do with either of  
16 those activities.

17 Similarly, with the second part of the  
18 year, the Rio Tinto, as I think was alluded to, was a  
19 supplier of talc for the -- during the time frame.  
20 And he provided technical report for talc, including  
21 IR and CIR, and they're both bodies that looked into  
22 the question of talc and ovarian cancer. And, you  
23 know, that seems to be kind of one of the two things  
24 that are identified there as important goals during  
25 the second half of the year. And I just want to make

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1 sure that the mid-year and year-end assessments  
2 relating to those issues do not directly or  
3 indirectly deal with talc.

4 That may not have been apparent to your  
5 Honor when you were viewing it, and I mean that just  
6 because we've been living and breathing this for the  
7 past couple of years, and I wanted at least some  
8 clarification on that.

9 SPECIAL MASTER SCHNEIDER: Mr. Tisi,  
10 this frankly seems to me one of the easier ones  
11 because, one, I can certainly represent to you that  
12 there is no mention of talc or asbestos here in any  
13 of the documents.

14 MR. TISI: Okay.

15 SPECIAL MASTER SCHNEIDER: The year-end  
16 assessment is in the context of baby sun screen  
17 products.

18 MR. TISI: Okay.

19 SPECIAL MASTER SCHNEIDER: Nothing to  
20 do with this case.

21 And the mid-year assessment has to do  
22 with oxybenzone. I'm assuming that has nothing to do  
23 with this case.

24 MR. TISI: Okay.

25 SPECIAL MASTER SCHNEIDER: So you can

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1 have some comfort --

2 MR. TISI: Thank you.

3 SPECIAL MASTER SCHNEIDER: -- that  
4 nothing that's directly or indirectly related to talc  
5 is in that section of the report.

6 MR. TISI: I appreciate that. And I  
7 apologize if I was tedious on that, but this section  
8 was of particular concern to us.

9 SPECIAL MASTER SCHNEIDER: No. You  
10 know, I think you raised a good point, Mr. Tisi. If  
11 there is a good faith belief or question about a  
12 particular redaction, that's better than saying look  
13 at the whole document. So I welcome the opportunity  
14 to look at specific concerns that you have.

15 MR. TISI: Thank you.

16 SPECIAL MASTER SCHNEIDER: So if you  
17 have them, raise them.

18 MR. TISI: I appreciate that, your  
19 Honor. Thank you so much.

20 SPECIAL MASTER SCHNEIDER: Okay. For  
21 the good of the order, Mr. Placitella was out walking  
22 his dog while we were arguing.

23 (Laughter)

24 MR. PLACITELLA: No, I was not.

25 MR. TISI: Watching Mr. Placitella's

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1 faces during my argument always gives me comfort,  
2 your Honor.

3 MR. BERNARDO: Oh, now I'm disappointed  
4 that Chris wasn't on my screen. Oh, gees, I had to  
5 scroll over.

6 MR. TISI: I mean, he was doing horns  
7 and all that kind of stuff. Thank you.

8 MR. PLACITELLA: Not true. Not true.

9 MR. BERNARDO: Your Honor, since we're  
10 all gathered and at the risk of having to schedule  
11 something next week, and I will work with the  
12 plaintiffs on it, I just want to forecast another  
13 issue that I think we may need to talk about or maybe  
14 plaintiffs would agree, which is we have been working  
15 I think very cooperatively with Ms. O'Dell and Mr.  
16 Lapinski on the whole privilege challenge. Due to  
17 nobody's fault, although perhaps I could take some  
18 blame for our vendor's fault, the issues of trying to  
19 identify the documents that will be the subject of  
20 the representative documents has been more  
21 challenging just in terms of sort of taking into  
22 account all the multiple privilege challenges that  
23 are going on. And we've been working with  
24 plaintiffs' counsel to identify that set.

25 That's a very long windup to my

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1 briefing team tells me that they're going to probably  
2 need an additional week in order to get time on -- I  
3 don't know, I mean, I'm happy to meet and confer with  
4 plaintiffs or if they'll agree with it now, I don't  
5 think that's going to affect any other timing in the  
6 case, but I just wanted to raise that as soon as it  
7 became clear to me that -- in order to give your  
8 Honor hopefully a meaningful package that will have  
9 sufficient explanation, we're still -- we're  
10 still -- I need to meet and confer with one of my  
11 colleagues tomorrow trying to sort through and get  
12 the final set done.

13 SPECIAL MASTER SCHNEIDER: Mr.  
14 Bernardo, just meet and confer with plaintiffs'  
15 counsel. I have complete faith that everybody is  
16 acting in good faith. Whatever you think is  
17 reasonable, I'm sure it will be blessed. I just  
18 don't want to put this off too long.

19 MR. BERNARDO: Of course.

20 SPECIAL MASTER SCHNEIDER: So if  
21 plaintiffs think a week is reasonable and you're  
22 agreeable, that's fine with me.

23 Have you at least identified the -- I  
24 know you're working on the specific documents, but  
25 have you identified the categories, like --



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1 MR. BERNARDO: They're all identified  
2 and we're getting --

3 (Cross talk)

4 MS. O'DELL: Yes. I'm happy to speak  
5 to that.

6 We identified the categories that we're  
7 challenging. We've also gone through the privilege  
8 log and we've identified specific documents that are  
9 being challenged and we have made an initial attempt  
10 to identify representative documents to be reviewed  
11 in camera.

12 SPECIAL MASTER SCHNEIDER: Okay.

13 MS. O'DELL: I think what Rich is  
14 referring to is there were some issues with J&J's  
15 vendor, certain documents now are not being claimed  
16 as privilege, and so we're just trying to sort all  
17 that out. And we're happy to meet and confer and  
18 agree to some reasonable schedule.

19 SPECIAL MASTER SCHNEIDER: Whatever  
20 schedule you work out that you're agreeable to and  
21 it's reasonable is fine with me.

22 Are you at liberty to identify at least  
23 what the categories are?

24 MS. O'DELL: Yes, your Honor. And I  
25 would ask my colleagues if I forget some of them.

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1 There are essentially, I think, five categories, but  
2 documents where there is no attorney copied from  
3 company employees. Documents where a third party is  
4 copied on the document.

5 SPECIAL MASTER SCHNEIDER: So that  
6 would be an argument as to waiver?

7 MS. O'DELL: Yes, sir.

8 SPECIAL MASTER SCHNEIDER: Okay.

9 MS. O'DELL: There are documents where  
10 a lawyer is CC'd, but it appears not to be for  
11 purposes of seeking legal advice. And so those are  
12 the three main ones.

13 There are some others, and I'll ask  
14 Mr. Placitella to remind me because I can't remember  
15 the other two.

16 Those are the three main categories I  
17 will say, though.

18 MR. PLACITELLA: Those are the ones  
19 that jump out at me. Rich probably knows better.

20 (Cross talk)

21 MS. O'DELL: I'm happy to pull that  
22 out, your Honor. I'm sorry I didn't have that right  
23 off the top of my head.

24 SPECIAL MASTER SCHNEIDER: No, no  
25 problem. These seem to be attorney-client issues.

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1 Is there an issue whether something is work product  
2 as opposed to business?

3 MS. O'DELL: I think there are those  
4 issues, your Honor. And there also is not only, you  
5 know, the question of documents that have been  
6 withheld for privilege, there is also sort of a  
7 companion issue of redaction. There is a complete  
8 redaction log that, from our perspective, doesn't  
9 meet the standard of the rule because it doesn't  
10 provide reasons for the redactions, et cetera. So  
11 it's a full scope of challenges. We'll do our best  
12 to get them organized in a way that will, you know,  
13 make the process efficient for your Honor.

14 MR. PLACITELLA: There is one more  
15 category that I just thought of, and that is there is  
16 a claim that although the document itself may not  
17 contain legal advice, it's information needed to  
18 provide legal advice. And, you know, our argument  
19 obviously is that's facts, not legal advice and we're  
20 going to have to probably address that.

21 MS. PARFITT: And I think the last one  
22 is a business technical. Leigh, I don't know if you  
23 mentioned that or not.

24 SPECIAL MASTER SCHNEIDER: I'm sorry?

25 MS. PARFITT: I'm sorry. The last one

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1 was a business technical category. Leigh, if you  
2 said that, I didn't catch it.

3 SPECIAL MASTER SCHNEIDER: As opposed  
4 to a legal issue, a business issue?

5 MS. PARFITT: Correct, yeah.

6 SPECIAL MASTER SCHNEIDER: It sounds to  
7 me like none of these issues are surprising because  
8 they arise in probably every complex litigation and  
9 the law is not that complicated. It's a matter of  
10 reading the documents, understanding the context and  
11 maybe it's an issue to be determined hearing from the  
12 witness him or herself. But we'll leave that issue  
13 down the road.

14 MR. TISI: Your Honor, I did want to  
15 kind of raise at least one overarching issue with  
16 respect to the privilege question, which is something  
17 that Mr. Bernardo and I have been discussing, which  
18 is -- I think I understand that your Honor knows that  
19 there are some efforts to have a deposition of Mr.  
20 O'Shaughnessy. We've talked about that --

21 SPECIAL MASTER SCHNEIDER: Yes.

22 MR. TISI: -- in several instances.

23 I understand that there has been some  
24 discussions in other cases as well in which you may  
25 be involved. And we are looking towards having that

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1 done or at least scheduled at some point. Remind me  
2 of the date, Rich.

3 MR. BERNARDO: The deposition has been  
4 agreed to in the -- as your Honor knows, because you  
5 were on a call for the New Jersey cases to begin on  
6 the 22nd with I'll call it carryover on the 23rd.  
7 I've been talking with Mr. Tisi so we can deal with  
8 this all together to do the ovarian part the  
9 following two days. I'm still working with Mr. Tisi  
10 out of respect to the New Jersey proceeding, I'm  
11 trying to wait until that gets locked down and a  
12 Special Master gets assigned just so I can then sort  
13 of move on.

14 But Mr. Tisi and I have been working  
15 together, and I'm going to be sending him something  
16 in writing to set forth some of the terms that I  
17 think we agreed to so that we can make this happen by  
18 agreement and cooperation rather than litigation.

19 SPECIAL MASTER SCHNEIDER: Mr. Tisi,  
20 let me just add, when you discussed this extension  
21 with Mr. Bernardo, I was anticipating, absent unusual  
22 circumstances, nobody knows what's going to happen,  
23 and if there was going to be an undue volume of  
24 materials, I was hoping to rule on that privilege  
25 issue either the 18th or very, very soon after that.

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1 I wasn't going to let the issue sit.

2 MR. TISI: Well, that was the reason  
3 why I raised it, because you were talking about a  
4 briefing schedule and extensions and categories of  
5 documents and I wanted to kind of put it in context.  
6 And then your Honor made the comment of, well, maybe  
7 we need to hear from the witness, you know --

8 SPECIAL MASTER SCHNEIDER: We might.  
9 We might.

10 MR. TISI: I wanted to kind of say  
11 well, you know, all of those things, we have a  
12 witness for whom we may be -- some of those questions  
13 may be being asked, you know, in the latter part of  
14 June, so I want all of these discussions to at  
15 least -- you know, I understand things may come  
16 afterwards and we may have to do a supplemental  
17 deposition, we may have to do that, but I wanted to  
18 at least be aware that where the time frames are and  
19 that all these puzzle pieces kind of fit together.

20 SPECIAL MASTER SCHNEIDER: Mr. Tisi, as  
21 soon as I get defendant's brief and affidavit and see  
22 the documents, I'll know whether I need testimony or  
23 not.

24 MR. TISI: Okay.

25 SPECIAL MASTER SCHNEIDER: I don't have

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1 to wait to get plaintiffs' position.

2 MR. TISI: Okay.

3 SPECIAL MASTER SCHNEIDER: So that can  
4 certainly be done on the 18th, if we go forward on  
5 that date.

6 I raised this issue with you to let you  
7 know what my plan was, again absent unusual  
8 circumstances or unforeseen circumstances. So when  
9 you talk to Mr. Bernardo about this schedule, just  
10 take that into consideration.

11 As long as I get all the briefs two or  
12 three days before the 18th, that's fine with me. I  
13 don't need two weeks to read the briefs.

14 MR. TISI: I understand.

15 SPECIAL MASTER SCHNEIDER: The more  
16 time I have to review in camera the documents, the  
17 better, obviously. The briefs are -- you know, we  
18 read them before, I know what they're going to say,  
19 now I just have to read the affidavit.

20 So again, I'll leave it in your very  
21 capable hands, but I'm glad I was able to tell you  
22 what my plan was.

23 I was not planning on letting this  
24 issue sit. It's just happenstance that the oral  
25 argument is going to be a few days before you

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1     depose -- not you, but they depose O'Shaughnessy,  
2     which I understand, correct me if I'm wrong, is not  
3     going to be cross-noticed, at least when we spoke the  
4     other day in the state asbestos cases. So then we  
5     may have another issue whether he's going to be  
6     deposed in this MDL.

7                     MR. TISI: Well, I think that Mr. --  
8     well, you say correct me if I'm wrong, if you're  
9     wrong. I would suggest that Mr. Bernardo had a  
10    deadline to object to the cross-notice in the MDL and  
11    I think we agreed that that kind of -- that's kind of  
12    gone. And I do believe that Mr. Bernardo has agreed  
13    to produce him in the -- when you say the MDL, he's  
14    being produced pursuant to an order in Missouri and  
15    cross-noticed in the MDL, and I believe that we've  
16    kind of -- that bridge has been crossed. And I  
17    believe he's going to be produced. You know, we're  
18    still working on the details of it, including the  
19    date, but I don't think that that -- I don't think  
20    there is going to be a question as to whether he's  
21    going to be produced in the ovarian cancer cases.

22                    MR. BERNARDO: Your Honor, I completely  
23    agree with Mr. Tisi and we just agreed it wasn't  
24    necessary to effectuate that and do an objection  
25    because he and I were working towards trying to come



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1 up with a resolution. So we didn't feel as if there  
2 would need to be a briefing schedule specifically in  
3 the MDL on it. But he would be produced and it will  
4 be, like when the day and everything is set,  
5 cross-noticed in the MDL.

6 So the idea would be there will be a  
7 deposition for the mesothelioma cases and then there  
8 will be a deposition for the ovarian cancer cases in  
9 the multidistrict litigation and in the Missouri  
10 litigation.

11 SPECIAL MASTER SCHNEIDER: I thought,  
12 and again, I don't have the experience that you  
13 gentlemen have, but I thought in the normal world if  
14 they're deposing him on the 22nd, why aren't both  
15 captions on the case and after the first attorney is  
16 done, the second attorney continues? But it sounds  
17 like you're going to do --

18 MR. BERNARDO: Would that the world  
19 were that simple, your Honor.

20 SPECIAL MASTER SCHNEIDER: -- separate  
21 physical depositions.

22 MR. TISI: Yeah. These really -- I  
23 mean, it kind of goes to the point that even though  
24 there are overlapping issues, your Honor, and there  
25 clearly are, the focus of these are different cases,

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1 different theories in different cases, and the idea  
2 is, you know, particularly in the federal court,  
3 where, you know, there is not a specific rule  
4 relating to the discovery deposition and then a  
5 preservation deposition, they're being conducted in a  
6 certain way in the MDL that would be different. And  
7 so there is a good reason for separating them out.  
8 And we've done it that way. And I think we kind of  
9 agreed on that.

10 The question really is, you know, the  
11 details. And Rich and I hopefully, and Leigh and  
12 Michelle and Chris on our side will be working  
13 towards trying to put together something. And our  
14 hope is to have, at least for the ovarian cancer  
15 cases, a pre-deposition call with your Honor and  
16 Judge Norton, who would be supervising for the  
17 purposes of the Missouri cases, to talk about how we  
18 at least anticipate this process to work, because it  
19 is unusual. I mean, I've been doing this for 30  
20 years and I don't think I've ever run across this  
21 kind of arrangement. So hopefully we can have a  
22 pre-deposition call with your Honor and hopefully  
23 Judge Norton so that we can all be on the same page.  
24 And I think Mr. Bernardo kind of wants the same as  
25 well, if I can be so bold as to --

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1 MR. BERNARDO: We finally hit the first  
2 point where I disagree with Mr. Tisi. But in the  
3 spirit of compromise we agreed to proceed in that  
4 way. We strongly felt there ought to be one  
5 deposition that would get used in both cases, but we  
6 gave in on that point when we understood that that  
7 was a sticking point for both sides, so.

8 SPECIAL MASTER SCHNEIDER: Can I at  
9 least assume, hopefully, but it's up to you, that  
10 granted there is going to be separate issues in each  
11 of the proceedings, but hopefully Mr. Tisi won't have  
12 to ask the same questions about his education and his  
13 employment experience and the background information  
14 that they asked at the first deposition?

15 MR. TISI: Well, your Honor, you know  
16 again, because these are preservation depositions --

17 SPECIAL MASTER SCHNEIDER: Oh, that's  
18 right.

19 MR. TISI: -- that will be shown at a  
20 trial --

21 SPECIAL MASTER SCHNEIDER: That's  
22 right.

23 MR. TISI: So I didn't want to have,  
24 you know Mr. Block (ph) asking those questions and  
25 have to cut it and have another witness --

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1 SPECIAL MASTER SCHNEIDER: I got you.

2 MR. TISI: So it's an odd circumstance,  
3 but that's kind of the -- you know, in terms of  
4 allowing for the jury to not be jerked around, it  
5 makes it a little bit easier to do it. And that kind  
6 of, you know -- anyway, I think you see what I mean.

7 MR. BERNARDO: What I suggest, your  
8 Honor, is Mr. Tisi and I have some talking to do.  
9 I'm certain, and I rarely say that, that we will come  
10 to an agreement, largely because we keep giving in on  
11 everything.

12 MR. TISI: We do agree on that, your  
13 Honor, he just bends to my will.

14 (Laughter)

15 MR. BERNARDO: He's very persuasive.

16 SPECIAL MASTER SCHNEIDER: Maybe it was  
17 that hand injury from before.

18 MR. BERNARDO: Exactly. I didn't tell  
19 you exactly how I got that.

20 No, in all seriousness, I'm confident  
21 that Mr. Tisi and I can come to some agreement. I do  
22 agree, and I'm hopeful that a Special Master will be  
23 appointed in connection with the New Jersey cases  
24 soon. And if it's you, it's very easy to meet with  
25 you in that capacity as well. But I do think it will

1 be very important from the Johnson & Johnson  
2 defendant's perspective to have a pre-deposition  
3 discussion. Because, you know, let's face it, this  
4 is an unusual deposition. It's a lawyer, which is  
5 unusual to begin with. It's a litigation counsel,  
6 which makes it, you know, more unusual. And it's  
7 going back, talking to the lawyer about the  
8 litigation. So we just want to make sure that  
9 everybody is on the same page, frankly, as a courtesy  
10 to the witness and to avoid him --

11 MR. TISI: I didn't mean to open up a  
12 box of Pandoras. I know you were just talking about  
13 resolution of the privilege issues and I just wanted  
14 to put a pin in the fact that we have kind of a late  
15 June at least tentative date for this deposition just  
16 so that everything was in context. You know, we'll  
17 certainly continue to work on these issues, your  
18 Honor.

19 SPECIAL MASTER SCHNEIDER: Right. And  
20 if you need me, just like today, send me an email or  
21 a text or a phone and we'll get on a Zoom as soon as  
22 we can or phone as soon as we can. No problem.

23 I want to thank the court reporter  
24 again for being available on short notice. It's  
25 always good to talk to counsel.

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1                   If there is nothing else, I suppose we  
2   can adjourn for the day.

3                   MR. TISI: Thank you so much,  
4   everybody.

5                   SPECIAL MASTER SCHNEIDER: I won't  
6   enter any type of order until I receive the language  
7   from you gentlemen. Okay?

8                   MR. TISI: Thank you so much.

9                   SPECIAL MASTER SCHNEIDER: Good luck  
10   tomorrow.

11                  ALL COUNSEL: Thank you, your Honor.

12                  (Hearing adjourned)

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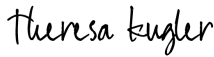
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## C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

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